Leelavathi a/p K Govindasamy v Sivan a/l Subramaniam & Anor

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCVC)(W)-148–01 OF 2014
ABDUL AZIZ AB RAHIM, MOHAMAD ARIFF AND MAH WENG KWAI JJCA
21 JANUARY 2015

Contract — Sale and purchase of land — Agreement — Registered proprietor and tenant entered into sale and purchase agreement to sell property — Tenant made renovations and occupied property without consent of owner — Property still under name of owner's deceased mother — Owner not yet appointed as administratrix to property — Allegation that agreement contained clause that balance purchase price to be paid by tenants within three months, with an extension of one month, from date of letters of administration — Whether copies between parties differed — Whether fraud existed — Validity of sale and purchase agreement — Whether there was limitation — Whether specific performance of sale and purchase agreement could be ordered

The appellant, the registered proprietor of a property had rented the said property to the first and second respondents. Before the first month of rental could be collected, the respondents had asked the appellant to sell the said property to them which the appellant later agreed. The respondents occupied the said property and made renovations without the appellant's knowledge and consent. Nevertheless, in complying with the respondents' wishes to buy the said property, the appellant and the respondents entered into a sale and purchase agreement ('the SPA') in which the respondents agreed to purchase the said property at the price of RM125,000. The respondents paid a deposit of 48% of the purchase price in the amount of RM60,000 to the appellant. However, the respondents failed to pay the balance of purchase price of RM65,000. At that material time, the said property was still under the appellant's late mother's name and the appellant was not yet appointed as an administratrix to the said property. The respondents were aware of this. According to the respondents, by virtue of cl 9 of the SPA, the parties agreed that the balance of purchase price of RM65,000 was to be paid by the respondents to the appellant within three months, with an extension of one month, from the date the appellant obtained the letters of administration ('the LOA') from the High Court. There was an undertaking made by the appellant that in the event that the transfer of the said property could not take place, the deposit of RM60,000 would be refunded to the respondents. It was this fact that became the major issue in this appeal. It was alleged by the appellant that the phrase '... or the sealed copy of the Probate from the High Court ...' that

was clearly stated in cl 9 of the SPA in the respondents' possession was omitted from cl 9 of the SPA that was kept in the appellant's possession, thus creating a significant difference between these two clauses although it was supposed to be the same. An allegation of fraud was raised by the respondents against the appellant. The LOA which specified the appellant as the administratrix for her late mother's estate was granted on 22 November 2005 and a copy of the same was served to the respondents. The appellant attempted to argue at trial that as at the time when she entered into the SPA, she was yet to be appointed as the administratrix of her late mother's estate, the SPA should be declared as null and void ab initio. The appellant then filed a suit against the respondents on claiming vacant possession of the said property and a declaration that the said agreement entered into between the appellant and the respondents was null and void. Additionally, the appellant prayed for a declaration that the respondents were staying in the said property in the capacity as tenants from the month of September 2000 to March 2011 on a rental payment of RM400 per month. Accordingly, a sum of RM9,600 needed to be refunded by the appellant to the respondents as the balance by deducting from part of the purchase price of the said property of RM60,000 received by the appellant earlier being the rentals for that duration. The appellant also prayed that in the event that there was a private caveat entered by the respondents on the said property, the same was to be removed. The respondents' defence was that the SPA was entered into by the appellant in her capacity as a representative of the vendor and with the undertaking that she would obtain the LOA for her late mother's estate and/or order for sale of the said property and not as the administratrix as of yet. It was upon this representation by the appellant that the respondents were convinced to enter into the SPA. The judicial commissioner dismissed the appellant's claim against the respondents but allowed the respondents' counterclaim with costs. Specific performance on the SPA was allowed and the sale and purchase transaction of the said property with the balance purchase price of RM65,000 was ordered to be completed. Hence, the present appeal. The issues that arose in this appeal were the validity of the SPA; whether there was limitation; rental payable in the interval period; and whether specific performance could be ordered in the circumstances.

Held, allowing the appeal and setting aside the order of the High Court:

(1) In exercising the court's discretion to order specific performance of a contract for the SPA, it was incumbent on it to be satisfied whether the party in whose favour specific performance was to be ordered was able and willing to settle the payment of the purchase price. The High Court in *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245 spoke of 'a continuous readiness and willingness to perform the contract from the date of the contract to the date of hearing'. It was clear on the evidence that the respondents here could not satisfy this requirement, and

therefore the High Court had erred in ordering specific performance (see para 19).

(2) The High Court had fundamentally erred in failing to appreciate that the counterclaim was essentially based on a claim for breach of contract for which the limitation period was six years calculated from the date of accrual of cause of action. There was no 'recovery of land' issue. The respondents were already in occupation and the appellant had sued to obtain vacant possession. The respondents' counterclaim was clearly time barred, even if the calculation took into account the terms of cl 9 of the SPA. The copy of the sealed LOA was served on the respondents' solicitors on 24 February 2006. Add another four months for payment, the last date for the appellant to deliver would be 24 June 2006, assuming the respondents were willing and able to settle the balance purchase price on the last day under cl 9. The counterclaim was filed on 18 October 2012. On either view, the counterclaim would be statute barred (see para 20).

(3) The court could not agree with the High Court's conclusions that the appellant had consented to the renovations and the non-payment of rental. A proper judicial appreciation of the evidence would have indicated the contrary. The inferences drawn by the judicial commissioner would effectively mean the respondents would enjoy residing in the said property free of charge for a good many years when they were unable to effect payment of the balance purchase price (see para 21).

(4) The appellant's claim for vacant possession was allowed but such vacant possession was to be given within a period of six months from the date of order, free of rentals. The sum of RM9,600 and the deposit were to be refunded to the respondents (see para 22).

[Bahasa Malaysia summary

Perayu, pemilik berdaftar hartanah telah menyewakan hartanah tersebut kepada responden pertama dan kedua. Sebelum bulan pertama sewaan boleh dikutip, responden-responden telah meminta perayu menjual hartanah tersebut kepada mereka yang kemudiannya telah dipersetujui oleh perayu. Responden-responden telah mendiami hartanah tersebut dan membuat pengubahsuaian tanpa pengetahuan dan persetujuan perayu. Namun begitu, dalam mematuhi hasrat responden-responden untuk membeli hartanah tersebut, perayu dan responden-responden telah memasuki perjanjian jual beli ('PJB') yang mana responden-responden bersetuju untuk membeli hartanah tersebut pada harga RM125,000. Responden-responden telah membayar deposit 48% daripada harga belian berjumlah RM60,000 kepada perayu. Walau bagaimanapun, responden-responden telah gagal untuk membayar baki harga belian sejumlah RM65,000. Pada masa matan, hartanah tersebut masih

di bawah nama mendiang ibu perayu dan perayu masih belum dilantik sebagai pentadbir kepada hartanah tersebut. Responden-responden menyedari tentang ini. Menurut responden-responden, menurut fasal 9 PJB itu, pihak-pihak telah bersetuju bahawa baki harga belian sejumlah RM65,000 hendaklah dibayar oleh responden-responden kepada perayu dalam tempoh tiga bulan, dengan lanjutan sebulan, dari tarikh perayu memperoleh surat pentadbiran ('SP') daripada Mahkamah Tinggi. Terdapat akujanji yang dibuat oleh perayu bahawa sekiranya pemindahan hartanah tersebut tidak berlaku, deposit RM60,000 itu akan dibayar balik kepada responden-responden. Fakta ini telah dijadikan isu utama dalam rayuan ini. Adalah dikatakan oleh perayu bahawa ungkapan '... or the sealed copy of the Probate from the High Court ...' yang jelas menyatakan dalam fasal 9 PJB itu dalam milikan responden-responden yang ditinggalkan daripada fasal 9 PJB itu yang disimpan dalam milikan perayu, oleh itu mewujudkan perbezaan ketara antara dua fasal tersebut meskipun ia sepatutnya sama. Pengataan fraud telah ditimbulkan oleh responden-responden terhadap perayu. SP itu yang menetapkan perayu sebagai pentadbir untuk harta pusaka mendiang ibunya telah diberikan pada 22 November 2005 dan sesalinan yang sama telah disampaikan ke atas responden-responden. Perayu telah cuba berhujah semasa perbicaraan bahawa oleh kerana pada masa dia memasuki PJB itu, dia masih belum dilantik sebagai pentadbir harta pusaka mendiang ibunya, PJB itu hendakah diisytiharkan terbatal dan tidak sah ab initio. Perayu kemudian telah memfailkan guaman terhadap responden-responden yang menuntut milikan kosong atas hartanah tersebut dan deklarasi bahawa perjanjian tersebut yang dimasuki antara perayu dan responden-responden adalah terbatal dan tidak sah. Tambahan pula, perayu telah memohon untuk satu deklarasi agar responden-responden yang tinggal dalam hartanah tersebut dalam kapasiti sebagai penyewa dari bulan September 2000 hingga Mac 2011 atas bayaran sewa RM400 sebulan. Sewajarnya, sejumlah RM9,600 perlu dibayar balik oleh perayu kepada responden-responden sebagai baki dengan memotong daripada sebahagian harga belian hartanah tersebut sejumlah RM60,000 yang diterima oleh perayu sebelum itu sebagai bayaran sewa bagi tempoh tersebut. Perayu juga memohon bahawa sekiranya terdapat kaveat persendirian yang dimasuki oleh responden-responden atas hartanah tersebut, yang sama perlu dibatalkan. Pembelaan responden-responden adalah bahawa PJB itu telah dimasuki oleh perayu dalam kapasitinya sebagai wakil penjual dan dengan akujanji bahawa dia akan memperoleh SP itu untuk harta pusaka mendiang ibunya dan/atau perintah untuk jualan hartanah tersebut dan bukan sebagai pentadbir lagi. Berdasarkan perwakilan ini oleh perayu yang responden-responden yakin untuk memasuki PJB itu. Pesuruhjaya kehakiman telah menolak tuntutan perayu terhadap responden-responden tetapi membenarkan tuntutan balas responden-responden dengan kos. Pelaksanaan spesifik atas PJB itu telah dibenarkan dan transaksi jual beli hartanah tersebut dengan baki harga belian RM65,000 telah diperintahkan untuk diselesaikan. Justeru, rayuan ini. Isu-isu yang timbul dalam rayuan ini adalah kesahan PJB itu; sama ada terhadap had

masa, sewa yang kena dibayar dalam tempoh jarak masa itu; dan sama ada pelaksanaan spesifik boleh diperintahkan dalam keadaan tersebut.

Diputuskan, membenarkan rayuan dan mengetepikan perintah Mahkamah Tinggi:

(1) Dalam melaksanakan budi bicara mahkamah untuk memerintahkan pelaksanaan spesifik suatu kontrak untuk PJB itu, adalah wajib untuknya berpuas hati sama ada pihak yang mana pelaksanaan spesifik telah diperintahkan untuk diperolehinya adalah mampu dan sanggup untuk menyelesaikan bayaran harga belian itu. Mahkamah Tinggi dalam kes *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245 menyatakan tentang 'a continuous readiness and willingness to perform the contract from the date of the contract to the date of hearing'. Adalah jelas berdasarkan keterangan bahawa responden-responden tidak memenuhi keperluan ini, dan oleh demikian Mahkamah Tinggi telah terkhilaf dalam memerintahkan pelaksanaan spesifik (lihat perenggan 19).

(2) Mahkamah Tinggi pada dasarnya terkhilaf kerana kegagalan memahami bahawa tuntutan balas itu pada asasnya berlandaskan tuntutan untuk pelanggaran kontrak yang mana tempoh had masa enam tahun telah dikira dari tarikh kausa tindakan terakru. Tiada isu tentang 'recovery of land'. Responden-responden telah pun mendiami tempat itu dan perayu telah menyaman untuk memperoleh milikan kosong. Tuntutan balas responden-responden jelas telah luput masa, meskipun pengiraan mengambil kira terma-terma fasal 9 PJB itu. Salinan SD yang termeterai telah disampaikan ke atas peguamcara responden-responden pada 24 Februari 2006. Jika ditambah empat bulan lagi untuk pembayaran, tarikh akhir untuk perayu untuk membuat serahan adalah 24 Jun 2006, dengan andaian responden-responden sanggup dan mampu menyelesaikan baki harga belian itu pada hari terakhir itu di bawah fasal 9. Tuntutan balas itu telah difailkan pada 18 Oktober 2012. Berdasarkan kedua-dua pandangan, tuntutan balas itu tetap luput had masa (lihat perenggan 20).

(3) Mahkamah tidak boleh bersetuju dengan kesimpulan Mahkamah Tinggi bahawa perayu telah bersetuju dengan pengubahsuaian dan sewa yang tidak berbayar. Kesedaran kehakiman yang wajar tentang keterangan dapat menunjukkan sebaliknya. Inferens yang dibuat oleh pesuruhjaya kehakiman secara berkesan memberi maksud responden-responden dapat menikmati tinggal dalam hartanah tersebut dengan percuma untuk beberapa tahun lamanya sedangkan mereka tidak mampu untuk membuat bayaran baki harga belian itu (lihat perenggan 21).

(4) Tuntutan perayu untuk milikan kosong telah dibenarkan tetapi milikan kosong tersebut hendaklah diberikan dalam tempoh enam bulan dari tarikh perintah, bebas sewa. Jumlah RM9,600 dan deposit itu hendaklah dibayar balik kepada responden-responden (lihat perenggan 22).]]

Notes

For cases on agreement, see 3(3) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 6054–6060.

Cases referred to

Wong Kup Sing v Jeram Rubber Estates Ltd [1969] 1 MLJ 245 (refd)

Legislation referred to

Limitation Act 1953 ss 6, 9(1)
Specific Relief Act 1950 ss 11(2), 19, 20(1)(a)

Appeal from: Civil Suit No 22NCVC-314 of 2011 (High Court, Shah Alam)

Puthan Perumal (Perumal Brothers) for the appellant.
SR Sreedevi Naidu (SR Naidu & Co) for the respondents.

Mohamad Ariff JCA:

[1] The appellant is the registered proprietor of a property known as HS(D) 37865, PT No 5377, Daerah Klang, Negeri Selangor bearing postal address No 24, Jalan 25/54, Taman Sri Muda, 40400 Shah Alam, Selangor ('the said property').

[2] The appellant contended that in September 2000, she had rented the said property to the first and second respondents, who are spouses, for a rental sum of RM500 per month. Nevertheless, before the first month of rental could be collected, the respondents through one Mr Siva, a property agent, had asked the appellant to sell the said property to them which the appellant later agreed. However, it was alleged that sometime in September 2000, the respondents had occupied the said property and made renovations without the appellant's knowledge and consent.

[3] Nevertheless, in complying with the respondents' wishes to buy the said property, the appellant and respondents entered into a sale and purchase agreement dated 13 March 2001 ('the said agreement'), prepared by Messrs Hassan Kuldeep & Co in which the respondents agreed to purchase the said property at the price of RM125,000. The respondents paid on 15 November 2000 a deposit representing 48% of the purchase price, ie RM60,000, to the appellant. However, the respondents failed to pay the balance of purchase price of RM65,000 despite many attempts to claim the same being made by the appellant.

[4] At that material time, the said property was still under the appellant's late mother's name and the appellant was not yet appointed as an administratrix to the said property. This fact was in the knowledge of the respondents. According to the respondents, by virtue of cl 9 of the said agreement that was kept in their possession, the parties agreed that the balance of purchase price of RM65,000 was to be paid by the respondents to the appellant within three months (with an extension of one month) from the date the appellant obtained the letters of administration from the High Court. There was an undertaking made by the appellant that in the event that the transfer of the said property could not take place, the deposit of RM60,000 would be refunded to the respondents. It is this fact that becomes the major issue in this appeal.

[5] It was alleged by the appellant that the phrase '... or the sealed copy of the Probate from the High Court ...' that was clearly stated in cl 9 of the said agreement in the respondents' possession was omitted from cl 9 of the said agreement that was kept in the appellant's possession, thus creating a significant difference between these two clauses although it was supposed to be the same. An allegation of fraud was raised by the respondents against the appellant. Since the maker of the said agreement ie Mr Kuldeep from Messrs Hassan Kuldeep & Co was not called to give evidence in court as he could not be located, the same was only marked as ID by the trial court.

[6] The letters of administration which specifies the appellant as the administratrix for her late mother's estate was granted on 22 November 2005. A copy of the same was served to the respondents' solicitors on 24 February 2006. The appellant attempted to argue at trial that as at the time when she entered into the said agreement on 13 March 2001, she was yet to be appointed as the administratrix of her late mother's estate, the said agreement should be declared as null and void ab initio on 15 November 2000.

[7] The appellant then filed a suit against the respondents on 17 March 2011, claiming vacant possession of the said property and a declaration that the said agreement entered into between the appellant and the respondents was null and void. Additionally, the appellant prayed for a declaration that the respondents were staying in the said property in the capacity as tenants from the month of September 2000–March 2011 on a rental payment of RM400 per month. Accordingly, a sum of RM9,600 needed to be refunded by the appellant to the respondents as the balance by deducting from part of the purchase price of the said property of RM60,000 received by the appellant earlier the rentals for that duration. The appellant also prayed that in the event that there was a private caveat entered by the respondents on the said property, the same was to be removed.

[8] The respondents' defence was that the said agreement was entered into by the appellant in her capacity as a representative of the vendor and with the undertaking that she would obtain the letters of administration for her late mother's estate and/or order for sale of the said property and not as the administratrix as of yet. It was upon this representation by the appellant that the respondents were convinced to enter into the sale and purchase of property transaction.

[9] The respondents thus defended the appellant's claim by filing a counterclaim against the appellant on 18 October 2012, claiming, inter alia:

(a) an order of specific performance on the said agreement;

(b) a court order that all the legal and ancillary costs as regards the completion of the said agreement be borne by the appellant;

(c) alternatively, the respondents claimed for general damages;

(d) the refund of RM60,000 being the 48% deposit that had been paid;

(e) special damages of RM12,500 equivalent to 10% deposit of the purchase price pursuant to cl 8 of the said agreement;

(f) 10% interests for item (iv) and (v) from October 2011 to the date of full settlement;

(g) renovation costs of RM45,900 at the rate of 8% from the date of the payment of the renovation costs to the date of full settlement;

(h) special damages on the legal fees for the preparation of the sale and purchase agreement dated 13 March 2001 for the sum of RM1,717.50 at the rate of 8% from the date of payment ie on 18 August 2000 to the date of full settlement;

(i) general damages;

(j) costs; and

(k) other relief as the court thinks fit and just.

[10] The learned judicial commissioner dismissed the appellant's claim against the respondents on 17 December 2013, but allowed the respondents' counterclaim with costs for the sum of RM20,000 to be paid by the appellant. Specific performance on the said agreement dated 13 March 2001 was allowed and the sale and purchase transaction of the said property with the balance purchase price of RM65,000 was ordered to be completed within four months from the date of the court's order.

[11] Four principal issues were identified by the learned judicial commissioner: (a) validity of the sale and purchase agreement; (b) limitation; (c) rental payable in the interval period; and (d) whether specific performance could be ordered in the circumstances. In respect of (a), the judicial commissioner came to a finding that the sale and purchase agreement in the possession of the defendant was the valid document, and contained the correct cl 9 as agreed between the parties on the date for payment of the balance purchase price:

> Within THREE (3) Months from the date of receipt of the sealed copy of the order for sale *or the sealed copy of the Probate from the High Court* with an extension of ONE (1) Month with interest calculated on the extended period at the rate of 10% per annum calculated on day to day basis. (Emphasis added.)

[12] As regards issue (b), the learned judicial commissioner found the counterclaim was filed within time, since the claim involved a 'recovery of land' which is covered under s 9(1) of the Limitation Act 1953 (12 years), not s 6 covering 'actions founded on a contract' (six years). The copy of the sealed letters of administration being served on the respondents' solicitors on 24 February 2006, and the counterclaim being filed on 18 October 2012, it was well within the 12 years from the date of accrual of the cause of action. Had s 6 applied, the converse would be true.

[13] On issue (c), the learned judicial commissioner held:

> Jika diteliti keterangan, pihak defendan memasuki hartanah tersebut pada September 2000 dan melaksanakan kerja-kerja pengubahsuaian pada hartanah tersebut. Jika plaintif dimaklumkan tentang kerja-kerja pengubahsuaian ini, sememangnya dalam bulan September 2000 semasa kerja-kerja dijalankan. Kalau beliau tidak membenarkan kerja-kerja pengubahsuaian dilakukan pada hartanah tersebut dan terdapat isu yang tergantung berkaitan sewa, kenapa beliau menandatangani perjanjian itu tujuh bulan kemudiannya ...

> Plaintif selepas itu mendiamkan diri dan hampir lima tahun kemudiannya membangkitkan isu ini semula ... (pp 19 and 22 of the judgment).

The inference from the above statements is that the appellant allowed the renovations and acquiesced in the non-payment of the monthly rentals pending fulfilment of payment of the balance purchase price as stipulated under the said agreement.

[14] In relation to whether the necessary conditions for an order for specific performance to be made (issue (d)), the High Court agreed with the respondents' contentions on the applicability of ss 11(2), 19 and 20(1)(a) of the Specific Relief Act 1950, particularly s 11(2). Section 11(2) specifies:

> Unless and until the contrary is proved, the Court shall presume that the breach of a contract to transfer immovable property cannot be adequately relieved by compensation in money, and that the breach of a contract to transfer moveable property can be thus relieved.

[15] Sections 19 and 20(1)(a) supplements this general provision by providing:

> s 19
>
> A contract, otherwise proper to be specifically enforced, may be so enforced though a sum be named in it as the amount to be paid in case of the breach, and the party in default is willing to pay the same.
>
> s 20
>
> (1) The following contracts cannot be specifically enforced:
>
> > (a) A contract for the non-performance of which compensation in money is an adequate relief.

[16] The learned judicial commissioner agreed with the respondents on issue (d) on account of their expenditure of RM45,000 on the renovations, the application for a loan from The Bank of Nova Scotia to settle the balance purchase price and the payment of the 48% purchase price. See the following passage in the judgment of the learned judicial commissioner:

> Peguam plaintif berhujah bahawa pelaksanaan spesifik tidak wajar diberikan kerana pihak defendan tidak ingin terikat dengan obligasi mereka di bawah perjanjian jual beli bertarikh 13 Mac 2001. Jika diteliti keterangan daripada pihak defendan, mereka telah membelanjakan hampir RM45,000.00 untuk kerja pengubahsuaian hartanah tersebut. Mereka telah memohon dan mendapatkan pinjaman dari The Bank of Nova Scotia Bhd sejak November 2001 lagi untuk baki jumlah harga belian hartanah tersebut dan memandangkan akan kelewatan untuk mendapatkan surat kuasa wakil telah menyebabkan kelulusan itu ditarik balik. Malah defendan telah membayar 48% daripada harga belian rumah tersebut. Untuk menyatakan bahawa

A beliau tidak berminat adalah suatu yang tidak wajar berbanding dengan keterangan dalam kes ini ... (p 30 of the judgment).

[17] In the grounds of appeal as disclosed in the memorandum of appeal, the appellant argued, inter alia, that the learned judicial commissioner had misdirected himself on the issues of limitation, specific performance and consent by the appellant to the carrying out of the renovation works on the said property and the non-payment of rental. These grounds are reproduced below:

> The learned Trial Judge erred, in law and in fact, and seriously misdirected himself in that he had failed to consider and appreciate the 1st Respondent's own admission at trial (page 454 lines 30–34 Rekod Rayuan Bahagian B Jilid 2(2)) that he was not continuously ready and willing and able to perform his obligation under the contract of sale and purchase dated 13.3.2001 in paying the balance purchase price of RM65,000.00, and therefore erred in granting the order for specific performance.
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> The learned Trial Judge erred, in law and in fact, and seriously misdirected himself in that he had failed to appreciate Clause 13 of the Sale and Purchase Agreement dated 13.3.2001 (page 485 Rekod Rayuan Bahagian C Jilid 3), which clearly states that the Respondents have to perform their part before being entitled to specific performance, but the learned Trial Judge nevertheless proceeded to grant an order for specific performance when the Respondents did not (and is not willing to at the time of trial) perform their part in paying the balance purchase price.
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> The learned Trial Judge erred, in law and in fact, and seriously misdirected himself in that he had failed to appreciate that the Respondents' cause of action, if any, arose on 24.2.2006 and was time-barred by limitation when the Respondents commenced the counterclaim on 18.10.2012.
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> The learned Trial Judge erred, in law and in fact, and seriously misdirected himself in that he found that because of the mere fact the Appellant executed the Sale and Purchase Agreement on 13.3.2001, the Appellant must have consented to the occupation and renovations commenced by the Respondents in September 2000 and that the Appellant was not seeking any rent from September 2000, when at all material times, the Appellant maintained the contrary.

[18] On p 454, *rekod rayuan, Bahagian* B *Jld* 2(2), the first respondent when responding to counsel's question in cross-examination said:

> Bakinya saya tidak boleh menjelaskan Yang Ariff. Kalau boleh, saya cuma boleh bayar 10,000 sahaja Yang Arif.

[19] In exercising the court's discretion to order specific performance of a contract for the sale and purchase of land, it is incumbent on it to be satisfied whether the party in whose favour specific performance is to be ordered was able and willing to settle the payment of the purchase price. The High Court in *Wong Kup Sing v Jeram Rubber Estates Ltd* [1969] 1 MLJ 245, spoke of 'a continuous readiness and willingness to perform the contract from the date of

the contract to the date of hearing'. It was clear on the evidence the respondents here could not satisfy this requirement, and therefore the High Court had erred in ordering specific performance.

[20] Nevertheless, more importantly, the High Court had fundamentally erred in failing to appreciate that the counterclaim was essentially based on a claim for breach of contract for which the limitation period is six years calculated from the date of accrual of cause of action. There was no 'recovery of land' issue. The respondents were already in occupation and the appellant had sued to obtain vacant possession. On the facts, the respondents' counterclaim was clearly time barred, even if the calculation took into account the terms of cl 9 of the agreement which was quoted earlier. The copy of the sealed letter of administration was served on the respondents' solicitors on 24 February 2006. Add another four months for payment, the last date for the appellant to deliver would be 24 June 2006, assuming the respondents were willing and able to settle the balance purchase price on the last day under cl 9. As indicated earlier, the counterclaim was filed on 18 October 2012. On either view, the counterclaim would be statute barred.

[21] On the facts of this appeal, we also could not agree with the High Court's conclusions that the appellant had consented to the renovations and the non-payment of rental. A proper judicial appreciation of the evidence would have indicated the contrary. The inferences drawn by the judicial commissioner would effectively mean the respondents would enjoy residing in the said property free of charge for a good many years when they were unable to effect payment of the balance purchase price.

[22] For the reasons stated above, we unanimously decided to allow the appeal and set aside the order of the High Court. We allowed the appellant's claim for vacant possession as prayed in para 18(c) of the statement of claim but such vacant possession to be given within a period of six months from the date of our order, free of rentals. We further ordered that the sum of RM9,600 be refunded to the respondents as prayed by the appellant.

[23] We made no order as to costs. The deposit was ordered refunded to the appellant.

[24] We felt that the wider justice of the case required that we provided a reasonable interval for the respondents to arrange for their moving out from the said property and secure some alternative accommodation.

Appeal allowed and order of the High Court set aside.

Reported by Afiq Mohamad Noor